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PROPERTY–LOSING CLARITY IN LOSS OF ACCESS CASES: THE MINNESOTA SUPREME COURT'S MUDDLED ANALYSIS IN *DALE PROPERTIES, LLC V. STATE*

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I. INTRODUCTION

One of the most intractable legal conundrums of our modern era concerns whether and when individuals earn the right to compensation as a result of governmental intrusions upon their property rights. Resolving this query is no simple task for our courts and legislatures because every individual's political, financial and ideological interests are necessarily impacted by any proposed or actual solution. A recent Minnesota Supreme Court decision, *Dale Properties, LLC v. State*,[1] exemplifies how these broader issues can arise from an ordinary, everyday occurrence.

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1. 638 N.W.2d 763 (Minn. 2002).

Dale Properties, LLC ("Dale") owns an undeveloped tract of land in Oakdale, Minnesota.[2] In 1997, a median crossover was closed opposite the property's only point of access.[3] As a result, access to and from the westbound lane of Highway 5 was severely restricted.[4] After Dale found difficulty in the development or sale of the property,[5] it sought compensation from the state.[6] The issue presented in *Dale Properties, LLC v. State* was narrow: can a compensable taking occur when the closure of a median crossover limits access to property in one direction?[7] Though the court's decision was relatively straightforward, any decision in this area of law has broad implications for cases concerning loss of access, regulatory takings and eminent domain.

Eminent domain is the government's power to take private property for public use[8] and has long been recognized as an implicit attribute of a sovereign government.[9] However, for nearly as long, courts have attempted to articulate appropriate rules to limit governmental taking of private property.[10] Within this contentious context, regulatory takings law has been one of the most consistently debated legal subjects in recent years.[11]

2. *Id.* at 764.
3. *Id.*
4. *Id.*
5. *Id.* at 765.
6. *Id.* at 764.
7. *Id.*
8. BLACK'S LAW DICTIONARY 541 (7th ed. 1999) (defining *eminent domain* as "the inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking").
9. *See infra* Part II.A.
10. *Id.*
11. *See, e.g.*, Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Efforts to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307 (1998) (chastising the U.S. Supreme Court for their continuing failure to clearly articulate an appropriate standard); James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143 (1997) (attempting, somewhat successfully, to explain why takings jurisprudence is a "bewildering mess"); Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411 (1993) (analyzing the politically-charged atmosphere of takings law); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993) (suggesting that Lucas v. South Carolina Coastal Council will not have the far-reaching consequences other commentators have predicted); William Michael Treanor, *The Armstrong Principle, The Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151 (1997) (proposing legislative endorsement of a judicial case-by-case determination in lieu of attempting to fashion legislative scheme regulatory determination).

Moreover, even within takings law, loss of access cases can present particularly complex issues.[12] In imperceptibly differing situations, standards for loss of access cases can vary significantly.[13]

This case note examines the Minnesota Supreme Court's decision in *Dale*.[14] Included in this examination is a brief review of the takings jurisprudence in the United States and Minnesota,[15] focusing on the most important recent decisions concerning loss of access in Minnesota.[16] This note also describes the pertinent facts and reasoning in the *Dale* decision.[17] In the fourth section, this note dissects and critiques the court's decision.[18] Finally, this note concludes that while reaching the proper ruling, the court failed to clarify the exact analytical framework necessary for loss of access cases in Minnesota.[19]

II. BACKGROUND

A. Takings by the Federal Government

Although scholars debate the extent and scope of their initial justifications,[20] the framers of the United States Constitution clearly deemed it necessary to protect private property from arbitrary governmental intrusions upon ownership.[21] The manifestation of this sentiment is embodied in the Takings Clause[22] of the Fifth Amendment to the United States Constitution.[23]

While the United States Constitution does not specifically

12. *See infra* Part II.C.
13. *Compare infra* Part II.C.1. *with* Part II.C.2.
14. *Id.*
15. *See infra* Part II.A.
16. *See infra* Part II.B-C.
17. *See infra* Part III.A-C.
18. *See infra* Part IV.A-D.
19. *See infra* Part V.
20. BERNARD H. SIEGAN, PROPERTY AND FREEDOM 20-29 (1997). *See also* BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 109 (2002) (herinafter SIEGAN, PROPERTY RIGHTS).
21. GEORGE SKOURAS, TAKINGS LAW AND THE SUPREME COURT 11-13 (David A. Shultz ed., 1998).
22. BLACK'S LAW DICTIONARY 1467 (7th ed. 1999) (defining *Takings Clause* as "the Fifth Amendment provision that prohibits the government from taking private property for public use without fairly compensating the owner").
23. U.S. CONST. amend. V. The Fifth Amendment to the U.S. Constitution reads, "nor shall private property be taken for public use, without just compensation." *Id.*

grant the government the power of eminent domain, it is generally considered inherent in sovereignty.[24] As early as the Roman period, governments used the sovereign power of eminent domain to regulate and acquire land for public purposes.[25] Limitations upon the government's ability to take property (e.g., the Fifth Amendment's Takings Clause) began appearing in state constitutions in 1777.[26] The Fifth Amendment, moreover, is applicable to the state governments by virtue of the Fourteenth Amendment's Due Process Clause.

The United States Supreme Court has reluctantly expanded the scope of governmental actions that require compensation.[27] Currently, there are two general categories of takings.[28] The original category is physical takings.[29] Physical takings occur when a governmental entity actually takes or physically occupies the land for a public use.[30] The second category is labeled regulatory takings because they occur when governmental regulations impose an inordinate burden on a specific piece of property thereby depriving an owner of the use or enjoyment of that property.[31]

The standard for determining when a physical taking occurs is simple and consistently applied,[32] but the standards for regulatory takings are extremely complex. Background on regulatory takings jurisprudence is necessary to put the loss of access in the *Dale*

24. *See* DANIEL S. GUY, STATE HIGHWAY CONDEMNATION PROCEDURES 5 (1971); NANCIE G. MARZULLA & ROGER J. MARZULLA, PROPERTY RIGHTS 3-4 (1997).

25. SKOURAS, *supra* note 21, at 11; *see also* GUY, *supra* note 24, at 4.

26. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 790 (1995) (providing a history of takings law before the Fifth Amendment).

27. SKOURAS, *supra* note 21, at 17-27 (developing a brief historical overview of takings law); SIEGAN, PROPERTY RIGHTS, *supra* note 20 at 75-110 (detailing major cases in takings law prior to 1987); Terri L. Lindfors, Note, *Regulatory Takings and the Expansion of Burdens on Common Citizens*, 24 WM. MITCHELL L. REV. 255, 262 (1998) (discussing regulatory takings law).

28. Allison J. Midden, Note, *Taking of Access: Minnesota Supreme Court Declines to Allow Admission of Evidence of Diminished Access Due to Installation of a Median in a Takings Case*, 25 WM. MITCHELL L. REV. 329, 332 (1999).

29. SKOURAS, *supra* note 21, at 17; DANIEL R. MANDELKER, LAND USE LAW 18 (1997) (explaining physical takings cases).

30. MANDELKER, *supra* note 29, at 18; Lindfors, *supra* note 27, at 261.

31. MANDELKER, *supra* note 29, at 18; *see also* Midden, *supra* note 28, at 332 n.21.

32. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (affirming the traditional rule that physical occupation of property is a taking).

Properties[33] decision, a result of governmental regulation, in context.

1. *Regulatory Takings on the Federal Level*

a. *The* Mahon *Decision*

Regulatory takings have only fully emerged in the last century.[34] The birth of regulatory takings can be traced to the United States Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*.[35] The facts in *Mahon* were relatively simple.

Originally, the Pennsylvania Coal Company ("Penn Coal") owned the entire disputed property.[36] In 1878, when Penn Coal sold the surface estate, it reserved an interest in the subsurface mineral rights.[37] To preserve that interest, Penn Coal also obtained a waiver against all claims due to subsidence of the surface estate.[38] In 1921, the Pennsylvania legislature passed the Kohler Act.[39] The Kohler Act was designed to prevent catastrophic surface subsidence by prohibiting the mining of coal beneath certain structures.[40]

After Penn Coal informed Mahon of its intention to mine beneath his home, Mahon sought a protective injunction under the Kohler Act.[41] The case eventually reached the United States Supreme Court on appeal. There, Penn Coal argued that the act was unconstitutional because it deprived them of a subsurface property right.[42] Agreeing, the Court issued what became the first regulatory takings decision, stating "[t]he general rule at least is that while property may be regulated to a certain extent, if

33. Dale Properties, LLC v. State, 638 N.W.2d 763 (Minn. 2002).

34. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). *See generally* Thomas A. Hippler, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine*, 14 B.C. ENVTL. AFF. L. REV. 653, 653-67 (1987) (discussing the significant developments and various standards in regulatory takings law). For a recent review of Mahon and subsequent regulatory takings law, *see also* Robert Brauneis, *The Foundation of our "Regulatory Takings" Jurisprudence: The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613 (1996).

35. 260 U.S. 393 (1922).

36. *Id.* at 412.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 412-13. Specifically, the statute was intended to protect streets, hospitals, schools, factories and houses. *See* Brauneis, *supra* note 34, at 619.

41. *Mahon*, 260 U.S. at 412.

42. *Id.*

regulation goes too far" it will be a taking.[43] The Court held that Penn Coal was unconstitutionally deprived of its subsurface mineral rights because the Kohler Act exceeded the authority of the state's police power and, therefore, constituted a taking.[44] At once enigmatic and simple, this 1922 holding was the first spark in what became the firestorm of regulatory takings jurisprudence.[45]

b. The Penn Central Transportation *Decision*

For the fifty-six years following the *Mahon* decision, the United States Supreme Court was largely silent on the regulatory takings issue. During this period, legal scholars and courts struggled amidst a great deal of confusion.[46] In 1978, the Court handed down the next major case in the law of regulatory takings: *Penn Central Transportation Co. v. New York*.[47]

In 1967, New York City's Landmarks Preservation Commission designated Grand Central Terminal, which was owned by Penn Central Transportation Company (Penn Central Co.), a historic landmark.[48] As a result of this designation, Penn Central Co. was restricted in its ability to further develop the property or make any changes to the exterior of the building.[49] Penn Central Co. claimed that the city's ordinance effectuated a taking of its property interest in the airspace above Grand Central Terminal.[50] The United States Supreme Court, while rejecting the owner's claim, admitted its

43. *Id.* at 414-15.

44. *Id.*

45. This standard has been described as "more of an observation about the difficulty in deciding when compensation should be paid than it is a rule capable of precise application." Floyd B. Olson, *The Enigma of Regulatory Takings*, 20 WM. MITCHELL L. REV. 433, 434 (1994).

46. Brauneis, *supra* note 34, at 680-86; Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 596-97 (1984); *see also* Frank I. Michelman, *Property, Utility, and Fairness: Commentaries on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1165 (1967) (stating that a "bewildering" array of tests have developed for determining whether a taking has occurred).

47. 438 U.S. 104 (1978).

48. *Id.* at 115-16. The commission was granted this authority under the New York City's Landmarks Preservation Law. *Id.* at 110.

49. *Id.* at 111. This type of change had to be approved in advance by a commission. *Id.* at 112. The designation, however, also granted Penn Central Co. the ability to transfer unused development rights to contiguous parcels under the same ownership. *Id.* at 113-14.

50. *Id.* at 107.

failure "to develop any 'set formula'" for takings cases.[51]

Although the Court in *Penn Central Transportation* acknowledged that Fifth Amendment cases were essentially "ad hoc factual inquiries," the Court identified several relevant factors for determining whether a governmental regulation went too far and, thus, required compensation.[52] Briefly, the *Penn Central Transportation* factors consider whether: 1) there was an enormous adverse financial impact upon the owner of the property; 2) the landowner had a large investment-backed expectation; and 3) the governmental regulation was suspect or a public necessity.[53] Specifically, a court ought to consider the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[54] The *Penn Central Transportation* decision, however, was not the last word from the Court. In the twenty-five years since *Penn Central Transportation*, the United States Supreme Court has decided several other high-profile regulatory cases.[55] In doing so, the Court has enunciated several other tests.[56] However, except in very specific circumstances, the application of the *Penn Central Transportation* test is usually appropriate.[57] Moreover, the United States Supreme Court has also recently stated that categorical rules ought to be avoided in takings jurisprudence.[58]

Unfortunately, in the takings law arena, reaching agreement on the issues[59] and articulating consistent analytical structures has

51. *Id.* at 124.

52. *Id.*

53. *Id.* This multi-factored test has been the subject of considerable discussion. *See, e.g.*, Page Carroccia Dringman, Comment, *Regulatory Takings: The Search for a Definitive Standard*, 55 MONT. L. REV. 245, 254-56 (1994) (examining the existing standards for regulatory takings law); Robert M. Washburn, *Reasonable Investment-Backed Expectations as a Factor in Defining Property Interest*, 49 WASH. U. J. URB. & CONTEMP. L. 63, 65 (1996) (utilizing the *Penn Central Transportation* standard to re-assess property rights).

54. *Penn Cent. Transp.*, 438 U.S. at 124.

55. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Agins v. City of Tiburon, 447 U.S. 255 (1980).

56. *See infra* notes 104-07.

57. Palazzolo v. Rhode Island, 533 U.S. 606, 617-18 (2001) (examining an application of the categorical rule from *Lucas v. South Carolina Coastal Council* and remanding with instructions to apply the *Penn Central Transportation* standard instead).

58. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S.Ct. 1465, 1489 (U.S. 2002) (O'Connor, J., concurring).

59. *See generally* Richard J. Lazarus, *Counting Votes and Discounting Holdings in*

been difficult. Commentators do agree, however, that takings law represents a continuing theoretical and legal quagmire.[60]

2. Loss of Access in the United States Supreme Court

Although the United States Supreme Court has never considered a loss of access case during the twentieth century, the Court has addressed the issue three times in the past.[61] These cases pre-date every major regulatory takings decision. Moreover, the analysis employed by the Court in these cases relies upon concepts borrowed from the law of servitude and nuisance.[62] As a result, the reasoning in these decisions, given the broad based development in regulatory takings law in the past one hundred years,[63] borders on irrelevant for the purposes of present day takings cases. A brief examination of the few United States Supreme Court decisions that concern loss of access shows that the factual scenario and the result were substantially the same in each case.

In the 1857 decision, *Smith v. Corp. of Washington*,[64] the federal government lowered the grade of a street.[65] By doing so, the government effectively destroyed the access to an abutting tract of property.[66] Twenty-one years later, in 1878, the Court decided *Northern Transportation Co. v. Chicago*,[67] a case in which the City of Chicago had constructed a tunnel and made improvements to the street.[68] These improvements blocked access to the landowner's property.[69] Only nineteen years after *Northern Transportation Co.*, in 1897, the Court decided *Gibson v. United States*.[70] The claim in *Gibson* arose as a result of the federal government's construction of a dike on the Ohio River which eliminated access to a pier.[71]

In deciding these cases, the United States Supreme Court utilized other property-related theories as the rationale to support

the Supreme Court's Takings Cases, 38 WM. & MARY L. REV. 1099 (1997).

60. *See, e.g.*, Midden, *supra* note 28, at 329 n.1.

61. *Id.* at 336.

62. Takings law was dominated by other property theories for years. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915); Hippler, *supra* note 34, at 655.

63. *See supra* II.A.1.

64. 61 U.S. 135 (1857).

65. *Id.* at 136.

66. *Id.*

67. 99 U.S. 635 (1878).

68. *Id.* at 636.

69. *Id.*

70. 166 U.S. 269 (1897).

71. *Id.* at 270.

their ultimate result. In *Smith*, the Court noted that the plaintiff's action was founded upon the theory that the plaintiff has "a right to keep a nuisance" at the expense of the collective good.[72] Likewise, in *Northern Transportation Co.*, the Court loosely framed its analysis on nuisance principles.[73] Finally, in *Gibson*, after the Court conducted a truncated Fifth Amendment analysis, it concluded that no taking took place because the improvement was for the public good and the governmental action was merely an "exercise of a servitude to which her property had always been subject."[74]

It is certainly noteworthy that the United States Supreme Court has never found a Fifth Amendment taking in a loss of access case.[75] Perhaps even more significant, the Court has also never entirely foreclosed the possibility that deprivation of access may constitute a compensable taking.

3. Police Power on the Federal Level

The act of using land gives rise to an implied obligation; neither a property owner nor a mere user may use the land in a way that is injurious to others. The government enforces this obligation through its police power. Police power has eluded static definition,[76] but courts have used the term in numerous situations to justify the regulation or taking of property without providing compensation.[77]

The modern police power has ancient conceptual origins.[78] As the close legal and theoretical counterpart of eminent domain,[79] it

72. Smith v. Corp. of Washington, 61 U.S. 135, 146 (1857).

73. *Northern Transp. Co.*, 99 U.S. at 640.

74. *Gibson*, 166 U.S. at 275.

75. Midden, *supra* note 28, at 336.

76. The vague definition of *police power* often cited is: "the inherent and pleanry power of a sovereign to make all laws necessary and proper to preserve the public security, health, morality and justice." BLACK'S LAW DICTIONARY 1178 (7th ed. 1999).

77. *See, e.g.*, Dale Properties, LLC v. State, 638 N.W.2d 763 (2002).

78. Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 861-62 (2000). Justice Talmadge traced the historical roots of police power to the ancient Greeks: "the ancient Greeks recognized early on the importance of police power in their political philosophy." *Id.* at 861.

79. For a remarkably succinct discussion of the relationship between eminent domain and the police power of the state, see Dan Herber, Comment, S*urviving the View Through the Lochner Looking Glass: Tahoe-Sierra and the Case for Upholding Development Moratoria*, 86 MINN. L. REV. 913, 918-19 (2002). The difference between the two types of governmental power is simple. "Police powers and

is also considered an "inherent attribute of sovereignty at all levels of government."[80] Police power provides the government with "the power to so regulate the relative rights and duties of all within its jurisdiction as to guard the public morals, the public safety, and the public health, as well as to promote the public convenience and the common good."[81]

In the takings context, police power "encompass[es] the government's ability to regulate land use and personal property without incurring the obligation of paying compensation."[82] Although the state's police power cannot be minimized by requiring compensation whenever the state asserts it, the police power remains subject to the limitations of the federal and state constitutions.[83]

Although different theories exist to justify the exercise of the police power,[84] the search for a justification is largely an exercise in semantics. The efforts "to give definition to what may be an indefinable threshold between the police power and eminent domain have yielded only profound confusion for practitioners."[85] Indeed, many decisions are based upon "an unarticulated sense of fairness or justice that is shrouded in a cloud of paraphrased quotes from unreconciled state and federal decisions."[86] Difficult decisions are sprung from the unclear division between legitimate

eminent domain differ in that '[e]minent domain takes property because it is useful to the public,' whereas the 'police power regulates the use of property or impairs the rights in property because the free exercise of these rights is detrimental to public interest.'" *Id.* at 918 (quoting 3 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 16.02[3], at 16-58 n.42 (internal citations omitted)); *see also* Ray v. State Highway Comm'n 410 P.2d 278, 280-82 (Kan. 1966).

80. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 108 (1985).

81. House v. Mayes, 219 U.S. 270, 282 (1911).

82. Brian D. Lee, Note, *Regulatory Takings Depriving All Economically Viable Use of a Property Owner's Land Require Just Compensation Unless the Government Can Identify Common Law Nuisance or Property Principles Furthered by the Regulation*, 23 SETON HALL L. REV. 1840, 1844 n.26 (1993) (citing JOHN E. NOWACK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.10, at 423 (4th ed. 1991)). *See also* Herber, *supra* note 79, at 918 (citing Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 252-54 (1897)).

83. Marshall v. Kansas City, Mo., 355 S.W.2d 877, 883-84 (Mo. 1962).

84. For early theories on police power, see T.D. Havran, *Eminent Domain and the Police Power*, 5 NOTRE DAME LAWYER 380 (1930); R.S. Wiggin, *The Power of the State to Restrict the Use of Real Property*, 1 MINN. L. REV. 135 (1917); Lee, *supra* note 82, at 1845 n.26.

85. Olson, *supra* note 45, at 450.

86. *Id.*

exercises of the police power and state actions which require compensation.

B. Minnesota Takings

The Minnesota Constitution, like the United States Constitution, also contains a takings provision[87] which requires payment of just compensation when land is taken for public use. The Takings Clause of the United States Constitution's Fifth Amendment and the takings provision of the Minnesota Constitution share several common characteristics. Both ensure that the government cannot force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[88] Minnesota's provision, like the federal equivalent, utilizes several different tests to determine when a property owner is entitled to compensation.[89] Like those of many other jurisdictions, the Minnesota takings provision[90] is considered broader in application than the federal equivalent[91] because it contains the language "taken, destroyed or damaged."[92] Moreover, the statutory definition of a "taking" in Minnesota includes "every interference . . . with possession, enjoyment or value of private

87. MINN. CONST. art. I, § 13. This provision "imposes a condition on the exercise of the state's inherent supremacy over private property rights." Johnson v. City of Plymouth, 263 N.W.2d 603, 605 (Minn. 1978).

88. Zeman v. City of Minneapolis, 552 N.W.2d 548, 552 (Minn. 1996) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

89. *See, e.g.*, Lindfors, *supra* note 27, at 267-78. *See also* Olson, *supra* note 45, at 437-49.

90. Twenty-four other state constitutions also extend compensation to situations where property is "taken or damaged" rather than only "taken." Midden, *supra* note 28, at 337 n.58. *See, e.g.*, ALASKA CONST. art. 1, § 18 ("Private property shall not be taken or damaged for public use without just compensation"); CAL. CONST. art. I, § 19 ("Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner"); ILL. CONST. art. I, § 15 ("Private property shall not be taken or damaged for public use without just compensation"); TEX. CONST. art. I, § 17 ("No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made"). The remaining twenty-six states adopt a similar position through judicial interpretation. *See* Lindfors, *supra* note 27, at 259 n.24.

91. U.S. CONST. amend. V.

92. MINN. CONST. art. I, § 13. This language "was not part of the original Minnesota Constitution, but was added by amendment in 1896 to overrule court interpretations that denied consequential or indirect damages." Olson, *supra* note 45, at 436.

property."[93]

Minnesota gives greater protection to landowners than the federal government. According to the Minnesota Supreme Court, the takings provision of the Minnesota Constitution is to be given a broad interpretation so as to effectuate its purpose.[94] Compensation is even appropriate when property is indirectly damaged as a result of state action.[95] Based upon this constitutional and statutory directive, the "clear intent of Minnesota law is to fully compensate its citizens for losses related to property rights incurred"[96] as a result of state action.

1. Regulatory Takings in Minnesota

Minnesota regulatory takings law, however, like the federal counterpart, lacks clarity.[97] This is predictable because the United States Constitution and the Minnesota Constitution, with the exception of "taken, destroyed or damaged," rely upon virtually the same language.[98] Further, most Minnesota precedent on regulatory takings is couched in the propositions originally propounded by the United States Supreme Court.[99] The Minnesota Court of Appeals explicitly recognized that "Minnesota courts generally apply the federal takings standards"[100] to determine whether a land use regulation "deprives the property of all reasonable use."[101]

Minnesota has used numerous standards to determine when regulation rises to the level of a compensable taking.[102] Minnesota

93. MINN. STAT. § 117.025, subd. 2.

94. *See* State v. Strom, 493 N.W.2d 554, 558 (Minn. 1992) (citing MINN. STAT. § 160.08, subd. 5 (1986)).

95. Adams v. Chicago, B. & N.R. Co., 39 Minn. 286, 290, 39 N.W. 629, 631 (1888).

96. *Strom*, 493 N.W.2d at 558.

97. Christopher Dietzen, *Regulatory Takings Claims: Lessons from Palazzolo v. Rhode Island*, Bench & Bar, Minn. 27, 30 (Feb. 2002) (stating that "regulatory takings jurisprudence continues to be an area of law that defies any clear cut rules or answers.").

98. *Compare* MINN. CONST. art. I, § 13 *with* U.S. CONST. amend. V.

99. *See, e.g.*, Zeman v. City of Minneapolis, 552 N.W.2d 548, 552 (Minn. 1996); Arcadia Dev. Corp. v. City of Bloomington, 552 N.W.2d 281, 287-88 (Minn. Ct. App. 1996).

100. *Arcadia*, 552 N.W.2d at 287.

101. *See* Thompson v. City of Red Wing, 455 N.W.2d 512, 516 (Minn. Ct. App. 1990); *see also* Parranto Bros. v. City of New Brighton, 425 N.W.2d 585, 590 (Minn. Ct. App. 1988).

102. *See* Lindfors, *supra* note 27 at 273 (describing, in a remarkably detailed and succinct fashion, the different tests and Minnesota decisions adopting each

courts have used the reasonable use test,[103] the extinguished economic value test,[104] the rough proportionality test,[105] the de facto test,[106] a variable multiple factor test,[107] and the public necessity doctrine.[108] But, the Minnesota Supreme Court has never candidly

test).

103. *See* McShane v. City of Faribault, 292 N.W.2d 253, 257-59 (Minn. 1980). Under this test, a taking occurs when a government regulation prevents reasonable use property. *Id.* at 257. However, this rule is not absolute. When a regulation has a legitimate objective, no taking occurs unless all reasonable use is denied. *Id.* at n. 2. *See also* Czech v. City of Blaine, 312 Minn. 535, 539, 253 N.W.2d 272, 274 (1977) (finding a taking where the government refused to rezone an area to accommodate a mobile home park); Pearce v. Village of Edina, 263 Minn. 553, 572-73, 118 N.W.2d 659, 672 (1962) (holding that a zoning ordinance was unconstitutional because it rendered some property useless or valueless). Lindfors, *supra* note 27, at 273 n.147.

104. Originally enunciated by the United States Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this test concerns whether the government has deprived an owner of all economically beneficial use of property. *See generally* Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993). This test was adopted by the Minnesota Court of Appeals in 614 Co. v. Minneapolis Cmty. Dev. Agency, 547 N.W.2d 400 (Minn. Ct. App. 1996).

105. This test was first stated by the United States Supreme Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). This test only applies when a development "condition" is imposed upon a landowner. *See* Note, *California Court of Appeal Finds Nollan's and Dolan's Heightened Scrutiny Inapplicable to Inclusionary Zoning Ordinance*, 115 HARV. L. REV. 2058, 2061-62 (2002). Assuming that a taking would result, the court must continue and apply the "rough proportionality" test from Dolan. *Id.* at 2062. This test requires a court to examine the effect of a regulation and determine whether the state's purpose adequately justifies the regulation. If such a "rough proportionality" exists, then the state has no obligation to compensate the landowner. *Id.* In Minnesota, under the "rough proportionality" test, three factors are considered to determine whether a regulation is a taking: if the regulation "promote(s) a public purpose; is not an unreasonable, arbitrary, or capricious interference with a private interest; and the means chosen bear a rational relation to the public purpose sought to be served." Arcadia Dev. Corp. v. City of Bloomington, 552 N.W.2d 281, 288 (Minn. Ct. App. 1996) (citing Grussing v. Kvam Implement Co., 478 N.W.2d 200, 202 (Minn. Ct. App. 1991)).

106. The de facto test has been used when the amount of control exercised by the government is suspect and the regulation may have been inappropriately directed toward a particular parcel. *See* Lindfors, *supra* note 27, at 275; Fitger Brewing Co. v. State, 416 N.W.2d 200 (Minn. Ct. App. 1987).

107. This test is a variation on the United States Supreme Court's decision in Agins v. City of Tiburon, 447 U.S. 255 (1980). Therein, the Court stated that, in order to constitute a compensable taking, a regulation must either (1) constitute an impermissible use of the government's police power; or (2) deny the property owner of the "economically viable" use of the property. *Id.* at 260. This test has been used by the Minnesota Court of Appeals on numerous occasions. *See, e.g.*, Parranto Bros., Inc. v. City of New Brighton, 425 N.W.2d 585, 590 (Minn. Ct. App. 1988).

108. *See* Lindfors, *supra* note 27, at 276. In certain situations, a court is

examined the varying standards set forth by different Minnesota Court of Appeals decisions[109] and explicitly adopted a single approach.[110] Moreover, in Minnesota, "no firmly established test exists for determining when a taking has occurred; instead, takings law turns largely on the particular facts underlying each case."[111] Thus, the Minnesota regulatory takings morass mirrors its federal equivalent. However, in one specific fashion, Minnesota adopts a different approach than the federal counterpart.

The Minnesota Supreme Court has adopted a heightened standard for regulations involving a governmental enterprise. The governmental enterprise exception is exemplified by *McShane v. City of Faribault*.[112] In *McShane*, the City of Faribault enacted use and building restrictions on the plaintiff's property[113] because it was situated next to the expanding city airport. The *McShane* court recognized that the regulation was "for the sole benefit of a governmental enterprise"[114] and the land-use regulation was, in actuality, a shortcut to avoid paying compensation through condemnation proceedings.[115] Because regulations promulgated for a governmental enterprise are clearly distinguishable from regulations aimed at benefiting the general public, the court ordered compensation for the landowner.[116]

Although Minnesota has applied the language and the general rules adopted at the federal level, the extent of Minnesota's adoption remains unclear. Except for an additional governmental enterprise rule and a more clearly articulated eagerness to provide

empowered to invoke the public necessity doctrine. For example, if public necessity requires destroying a single landowner's property because its destruction will divert a more significant community calamity, then the government is protected in such action. *See, e.g.*, McDonald v. City of Red Wing, 13 Minn. 38 (1868).

109. Many of the Minnesota standards for determining whether a compensable taking has occurred were originally set forth by the United States Supreme Court. *See supra* Part II.

110. Many of Minnesota's takings cases are Minnesota Court of Appeals cases and the Minnesota Supreme Court has not specifically addressed which standard is appropriate for determining when a taking occurs in Minnesota. *See supra* notes 102-107 and accompanying text.

111. Zeman v. City of Minneapolis, 552 N.W.2d 548, 552 (Minn. 1996).

112. 292 N.W.2d 253 (Minn. 1980); *accord* Thompson v. City of Red Wing, 455 N.W.2d 512, 517 (Minn. Ct. App. 1990).

113. *McShane*, 292 N.W.2d at 255.

114. *Id.* at 258.

115. *Id.* at 258-59.

116. *Id.* However, the court endorsed allowing the city to repeal the zoning ordinance instead of initiating eminent domain proceedings. *Id.* at 260.

compensation, the Minnesota regulatory taking standards definitely resemble those embodied in the federal regulatory takings law.

2. Police Power in Minnesota

State governments may also exercise sovereign police power to enact legislation or regulations to promote health, welfare or public safety.[117] The police power standard in Minnesota is as confused and problematic as its federal counterpart.[118] In fact, the Minnesota Supreme Court explicitly acknowledged the confused state of the law on one occasion:

> The dividing line between restrictions which may be lawfully imposed under the police power and those which invade the rights secured to the property owner by the constitutional provisions that his property shall not be taken or damaged without compensation, nor he be deprived of it without due process of law, has never been distinctly marked out, and probably cannot be. As different cases arise, the courts determine from the facts and circumstances of the particular case whether it falls upon one side or the other of the line.[119]

Police power, as a general concept, lacks clarity.

It is clear, however, that the Minnesota Supreme Court is willing to grant the state enormous discretion for traffic regulation. The Minnesota Supreme Court has noted certain specific situations that ought to be considered non-compensable exercises of the state police power: "Included in this category are the establishment of one-way streets and lanes of traffic; median strips prohibiting or limiting crossovers from one lane of traffic to another; restrictions on U-turns, left and right turns, and parking; and regulations governing the weight, size, and speed of vehicles."[120] Under other circumstances, the court has not hesitated to find an abuse of the police power and award compensation to an aggrieved landowner.[121]

117. *See* Lee, *supra* note 82, at 1844 n.26 (citing several major scholarly works concerning the scope of the state's police power in connection with property owners' rights).

118. *See supra* Part II.A.3.

119. State *ex rel.* Lachtman v. Houghton, 134 Minn. 226, 230, 158 N.W. 1017, 1019 (1916); *accord* Johnson v. City of Plymouth, 263 N.W.2d 603, 606 (Minn. 1978).

120. Hendrickson v. State, 267 Minn. 436, 441, 127 N.W.2d 165, 170 (1964).

121. *See* Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 41-42 (Minn.

C. Loss of Access in Minnesota

Loss of access is a subset of the broader "regulatory takings" category because access is usually lost as a consequence of governmental regulation. Generally, loss of access claims arise as a result of road construction, median closures or the re-routing of traffic. Loss of access issues arise in two distinct factual settings where: 1) a partial taking of property deprives the landowner of access and 2) no physical taking occurs but governmental action destroys access nonetheless.[122] The *Dale* decision arose under the latter circumstance.[123] Maintaining clarity between how these two situations differ is critically important to determining the applicable analytical framework and understanding the intricacies of loss of access cases.[124]

1. Loss of Access in Partial Takings

Partial takings occur when the government condemns only a portion of a landowner's property.[125] In a partial takings scenario, the government admits to taking property and initiates condemnation proceedings.[126] A property owner is awarded damages at that time. In partial takings cases, therefore, only a single issue exists: the measure of damages.

Determining compensation in a partial takings case can be difficult because almost any competent evidence may be considered if it legitimately bears upon the market value of the property.[127] Other factors also further complicate the computation of damages in partial takings cases.[128] The *Dale* decision does not raise any of these precise issues though. Instead, *Dale* presents a closely related and equally difficult dilemma arising in an inverse

1991) (providing compensation when Minneapolis police officers caused enormous damage to an innocent third party's home while pursuing a suspect).

122. Midden, *supra* note 28, at 340; Dale Properties, LLC v. State, 638 N.W.2d 763, 768 (Minn. 2002) (Paul H. Anderson, J., concurring specially).

123. *Dale Properties*, 638 N.W.2d at 764.

124. Cynthia M. Filipovich, Note, *Inadmissibility of Governmental Highest Possible Use Evidence in a Partial Takings Case: A Departure from Constitutional Just Compensation*, 70 U. DET. MERCY L. REV. 873, 880 (1993).

125. County of Anoka v. Blaine Bldg. Corp., 566 N.W.2d 331, 339 (Minn. 1997) (Paul H. Anderson, J., dissenting).

126. *Id.*

127. MINN. CONST. art. I, § 13; MINN. STAT. § 117.025 subd. 2 (2001).

128. *See, e.g.*, State v. Strom, 493 N.W.2d 554, 562 (Minn. 1992) (Simonett, J., dissenting in part and concurring in part).

condemnation situation.

2. Loss of Access in Inverse Condemnation

Loss of access cases are often brought by the landowner as inverse condemnation proceedings.[129] Unlike a partial takings case, an inverse condemnation case presents the primary issue of whether there has been a taking.[130] Inverse condemnation, according to the Minnesota Supreme Court, is "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency."[131]

A landowner who brings an inverse condemnation claim must prove that the government is liable for a taking.[132] Compensation is appropriate if the government's use of nearby or adjacent property has denied him of use, enjoyment, or value of his land.[133] In Minnesota, the trial court has the responsibility to determine whether a property right has been taken in the constitutional sense.[134]

3. The Minnesota Law Guiding the Dale *Decision*

According to the Minnesota Supreme Court, its resolution of *Dale Properties, LLC v. State* was controlled entirely by three of its prior decisions.[135] It is highly important to grasp the facts and reasoning of these decisions because regulatory takings decisions are essentially *ad hoc* factual inquiries.

129. *See, e.g.*, Gibson v. Comm'r of Highways, 287 Minn 495, 498, 178 N.W.2d 727, 729-30 (1970) (describing the typical inverse condemnation case). Landowners who believe that they are entitled to compensation may begin mandamus proceedings by virtue of MINN. STAT. § 117.075 (2001).

130. Filipovich, *supra* note 124, at 879.

131. Alevizos v. Metro. Airports Comm'n, 298 Minn. 471, 477, 216 N.W.2d 651, 657 (1974) (quoting Thornburg v. Portland, 376 P.2d 100, 101 (Or. 1962)).

132. Filipovich, *supra* note 124, at 879.

133. *Id.* (citing JESSIE DUKEMINIER & JAMES E. KRIER, PROPERTY § 10, at 1098-99 (2d ed. 1988) (internal citation omitted)).

134. Thomsen v. State, 284 Minn. 468, 476, 170 N.W.2d 575, 581 (1969) (remanding for a determination of constitutional property damage); *see also* State v. Prow's Motel, Inc., 285 Minn. 1, 4, 171 N.W.2d 83, 84 (1969) (relying on *Thomsen* and remanding for a determination).

135. Dale Properties, LLC v. State, 638 N.W.2d 763, 765-66 (Minn. 2002).

a. The Hendrickson *Decision*

An early inverse condemnation case in Minnesota concerning loss of access was *Hendrickson v. State*.[136] The loss of access occurred in *Hendrickson* when the state rebuilt and widened a portion of Highway 63 near Hendrickson's motel in Rochester, Minnesota.[137] In 1956, when Hendrickson purchased the disputed property, two driveways provided the motel unlimited access to Highway 63.[138] Sometime thereafter, the state designated the thoroughfare a controlled access highway.[139] In 1958, reconstruction began.[140] The highway was rebuilt with a median, service roads, and controlled points of entry.[141] The state did not condemn any of the Hendrickson's motel property,[142] and the plaintiffs retained access via the same driveways, but the driveways were shortened from 85 feet to 40 feet.[143] Significantly, however, Hendrickson no longer had direct unlimited access to either direction of traffic.[144] Instead, the property's remaining access necessitated travel in a circuitous route via the newly installed service road.[145]

The *Hendrickson* case presented a specific issue: whether the property "suffered compensable damage by being denied access to the main thoroughfare except at interchanges yet to be designated, if the property has unlimited access to a service road over which the main thoroughfare may be reached by a circuitous route."[146] The issue, in other words, was whether a landowner is entitled to compensation for having his once unlimited access reduced to circuitous access.

According to the *Hendrickson* court, Minnesota and the weight of other authority in 1964 adhered to the broad proposition that "access to a public highway from abutting property . . . may not be denied without compensation."[147] Controlling or limiting access,

136. 267 Minn. 436, 440, 127 N.W.2d 165, 169 (1964).
137. *Id.* at 437, 127 N.W.2d at 167.
138. *Id.* at 437, 127 N.W.2d at 167-68.
139. *Id.* at 437, 127 N.W.2d at 168.
140. *Id.*
141. *Id. at* 437, 127 N.W.2d at 167.
142. *Id.* at 438-39, 127 N.W.2d at 168-69.
143. *Id.*
144. *Id.*
145. *Id. at* 440-41, 127 N.W.2d at 169-70.
146. *Id.* at 440, 127 N.W.2d at 169.
147. *Id.* at 440-41, 127 N.W.2d at 169-70 (citing Burnquist v. Cook, 220 Minn. 48, 57, 19 N.W.2d 394, 399 (1945); Gustafson v. Hamm, 56 Minn. 334, 339, 57 N.W. 1054, 1055 (1894); Underwood v. Town Bd. of Empire, 217 Minn. 385, 388,

however, was generally considered a non-compensable exercise of the state's police power.[148] The court acknowledged that in certain situations traffic regulations which unduly burden a specific property owner "may cause compensable injury."[149] A compensable injury to the property, the court continued, could occur if the limitation in access is "different in kind and not merely in degree from that experienced by the general public."[150]

The *Hendrickson* court also stated that Minnesota property owners have a right to "reasonably convenient and suitable access"[151] to an abutting highway in at least one direction.[152] Furthermore, what constitutes reasonably convenient and suitable access was a fact question for a jury to determine.[153]

b. The Gannons *Case*

Only two short years later, in 1966, the Minnesota Supreme Court decided *State by Mondale v. Gannons*, Inc.,[154] another inverse condemnation case concerning loss of access.[155] The loss of access in *Gannons* also arose from road construction.[156] The roadway adjacent to Gannons' property was rebuilt to provide for the installation of a median and one-way traffic in both directions.[157] As in *Hendrickson*, the median limited Gannons' once unlimited access to a circuitous route.[158] The plaintiff petitioned for condemnation proceedings, alleging that the highest and best use of the property had changed from restaurant to industrial.[159] Evidence in the

14 N.W.2d 459, 461 (1944); State by Burnquist, v. Miller Home Dev., Inc., 243 Minn. 1, 9, 65 N.W.2d 900, 905 (1954). *See* W. E. Shipley, Annotation, *Abutting Owner's Right to Damages or Other Relief for Loss of Access Because of Limited-Access Highway or Street*, 43 A.L.R.2d 1072 (1955) and C. C. Marvel, Annotation, *Power to Restrict or Interfere with Access of Abutter by Traffic Regulations*, 73 A.L.R.2d 689, 691 (1960)).

148. *Hendrickson*, 267 Minn. at 440, 127 N.W.2d at 169.
149. *Id.* at 442, 127 N.W.2d at 170.
150. *Id.*
151. *Id.* at 446, 127 N.W.2d at 173. *Accord* Johnson v. Plymouth, 263 N.W.2d 603, 605 (Minn. 1978); Anoka v. Esmailzadeh, 498 N.W.2d 58, 60 (Minn. Ct. App. 1993).
152. *Hendrickson*, 267 Minn. at 436, 127 N.W.2d at 165.
153. *Id.* at 445-46, 127 N.W.2d at 172-73.
154. 275 Minn. 14, 145 N.W.2d 321 (1966).
155. *Id.* at 14, 145 N.W.2d at 321.
156. *Id.* at 16, 145 N.W.2d at 324.
157. *Id.*
158. *Id.* at 17, 145 N.W.2d at 325.
159. *Id.*

record showed, however, that after the road construction, the plaintiff re-modeled his restaurant and his business actually increased.[160] A hearing was held and the court determined that the property had suffered no damage.[161]

On appeal, the Minnesota Supreme Court cited several sections of the *Hendrickson* decision[162] and reiterated their assertion that addition of a median or dividers in a roadway cannot compel compensation.[163] The court stated that although a complete or unreasonable blocking of an abutter's access would constitute a taking, the regulation (taking) of access in only one direction was not necessarily compensable.[164]

In order to be consistent with *Hendrickson*, if the remaining access was not reasonably convenient and suitable, then compensation would be required. In its opinion, however, the *Gannons* court did not reach the question of whether the remaining access was reasonably convenient and suitable.[165] Rather, the court ordered a new trial because the jury may have been confused by ambiguous instructions.[166]

The *Gannons* decision, therefore, was relatively hollow. The Minnesota Supreme Court did not extend or modify the existing law in *Gannons*. It also failed to articulate a standard for determining reasonably convenient and suitable access. In fact, the decision may have been a step backward. If one overlooks why the case was remanded,[167] it may appear that the court eliminated the "reasonably convenient and suitable access" requirement of their loss of access compensation test from *Hendrickson*.[168]

c. The Blaine Building *Case*

The Minnesota Supreme Court did not address another loss of

160. State by Mondale v. Gannons, Inc., 275 Minn. 14, 17, 145 N.W.2d 321, 325 (1966).

161. *Id.*

162. *Id.* at 20, 145 N.W.2d at 326 (quoting *Hendrickson v. State*, 267 Minn. 436, 440, 127 N.W.2d 169, 171).

163. *Id.*

164. *Id.* at 24, 145 N.W.2d at 329.

165. *Id.* at 24-25, 145 N.W.2d at 329.

166. *Id.* at 25, 145 N.W.2d at 329.

167. *Id.*

168. In fact, Justice Paul H. Anderson discusses the potential for misreading this ambiguity in his concurring opinion to the *Dale Properties* decision. Dale Properties, LLC v. State, 638 N.W.2d 763, 769 (Minn. 2002) (Paul H. Anderson, J., concurring specially).

access case until some thirty years later in *Anoka v. Blaine Building Corp.*[169] In *Blaine Building*, an abutting landowner once again lost access as a result of road construction.[170] Anoka County widened a portion of University Avenue and installed a median which prevented access in one direction to and from the plaintiff's properties.[171] Significantly, unlike *Hendrickson* and *Gannons*, the plaintiff's property was also subject to a partial taking in connection with the highway reconstruction project.[172]

As in *Hendrickson*, the Minnesota Supreme Court stated that loss of access in one direction is non-compensable where reasonably convenient and suitable access is retained in the other direction.[173] The court concluded that loss of access "may not be the basis of severance damages where a property owner is subject to a partial taking and coincidentally loses access due to the construction of a median barrier."[174] The dissenting opinion observed the court's decision mistakenly relied upon inverse condemnation precedent[175] in what was clearly a partial takings context.[176]

The real issue in *Blaine Building* was whether the loss of access ought to be considered in the partial takings damage computation.[177] After *Blaine Building*, therefore, a possibility remained that if a median closure eliminated access in one direction and the remaining access was not reasonably convenient and suitable, compensation would be appropriate.

In Minnesota, and elsewhere, loss of access cases require intricate analysis. However, the milieu is traversable. *Gannons* is a relatively hollow decision because it relies entirely on *Hendrickson* and does not extend the law any further. Moreover, the holding in

169. 566 N.W.2d 331 (Minn. 1997).
170. *Id.* at 333.
171. *Id.*
172. *Id.*
173. *Id. Compare* Johnson Bros. Grocery, Inc. v. State, 304 Minn. 75, 229 N.W.2d 504 (1975). In *Johnson Bros.*, a highway construction project eliminated the plaintiff's immediate access to the highway. *Id.* The Minnesota Supreme Court, relying upon *Hendrickson*, found a taking and ordered compensation. *Id.* at 505. *But see* Courteaus, Inc. v. State, 268 N.W.2d 65 (Minn. 1978) (a similar fact situation with a contrary result based upon the same precedent).
174. Anoka v. Blaine Bldg. Corp., 566 N.W.2d 331, 336 (Minn. 1997).
175. *Hendrickson*, 267 Minn. at 441, 127 N.W.2d at 170; *Gannons, Inc.*, 275 Minn. at 14, 145 N.W.2d at 321.
176. *Blaine Bldg. Corp.*, 566 N.W.2d at 339 (Paul H. Anderson, J., dissenting).
177. Midden, *supra* note 28, at 349.

Blaine Building, because it was a partial taking case, should have had little effect on *Dale*'s resolution. In sum, the foregoing cases suggest that, regardless of context, the Minnesota Supreme Court is not eager to grant compensation for loss of access when the property retains access in at least one direction.

III. THE *DALE* DECISION

A. *Facts*

Dale Properties, LLC (Dale), owns approximately 29 acres of undeveloped land in Oakdale, Minnesota.[178] In 1965, the state condemned[179] a portion of the Dale Property to build an interchange at the intersection of Interstate 694 and Highway 5.[180] As a result, access to and from Dale's property was reduced to a single point which provided access to both directions of traffic on Highway 5.[181] Sometime between 1973 and 1997, a median was installed on Highway 5.[182] A median crossover point opposite Dale's property was maintained and, therefore, Dale retained full and unrestricted access to and from Highway 5.[183]

In 1997, the median crossover opposite Dale's property on Highway 5 was closed by the Minnesota Department of Transportation.[184] The closure eliminated direct access to the westbound lane of Highway 5.[185] Today, the property remains under the same zoning designations despite the restricted access.[186]

178. Dale Properties, LLC v. State, 638 N.W.2d 763, 764 (Minn. 2002).

179. This condemnation proceeding was entitled *State v. Morphew-James Investments Co. et. al.* Respondent's brief at 4, *Dale Properties, LLC v. State*, 638 N.W.2d 763 (Minn. 2002) (No. 00-837).

180. Dale Properties, LLC v. State, 619 N.W.2d 567, 569 (Minn. Ct. App. 2000), *rev'd*, 638 N.W.2d 763 (Minn. 2002). At one point, the Dale property had unlimited access to Interstate 694 and Highway 5. As a result of the 1965 condemnation proceeding, the state limited Dale's access to a thirty-foot portion of Highway 5 memorialized in a 1973 Final Certificate issued at the conclusion of the condemnation proceedings. *Id.* at 570.

181. *Dale Properties*, 638 N.W.2d at 764. Bordering the property to the west is Interstate 694. *Id.* To the east of the property is another parcel of land owned by a third party who is uninvolved in this litigation. *Id.* On the south side, there is a railroad right of way. *Id.* On the north side, where the property is bordered by Highway 5, a thirty foot access point exists on the west edge of the property. *Id.*

182. *Id.* at 570.

183. *Id.*

184. *Id.*

185. *Id.*

186. The property, at the time of the supreme court hearing, was zoned

On at least two occasions, Dale has attempted to sell or develop the property. In 1997, before the crossover was closed, Dale had entered into a purchase agreement with Ryan Companies, Inc. (Ryan).[187] However, after the crossover was closed, Ryan canceled the sale. Likewise, a purchase agreement signed in 1998 with Security Capital Pacific Trust ("Security"), was canceled by Security. Security and Ryan both cited complications arising directly from the restricted access to the property as the primary impetus behind the cancellation of their respective purchase agreements.[188]

As a result, in March of 1999, Dale petitioned the court for a writ of mandamus seeking the initiation of an inverse condemnation proceeding.[189] Specifically, Dale alleged difficulty in developing or selling the property and a diminution in value of approximately $800,000.[190]

B. Procedural History

Before the trial court, the State of Minnesota moved for summary judgment on grounds that the existence of access in at least one direction precluded the cause of action.[191] Apparently agreeing, the trial court granted summary judgment.[192] On appeal, the Minnesota Court of Appeals reversed and remanded,[193] noting that the trial court had failed to consider whether the retained access was "reasonably convenient and suitable."[194] The State subsequently petitioned the Minnesota Supreme Court to review

Industrial Office (northerly portion), General Industrial (southerly portion) and guided Commercial. Respondent's Brief at 3, Dale Properties, LLC v. State, 638 N.W.2d 763 (Minn. 2002) (No. 00-837) (citing Affidavit of Scott Rupert, Thomas Loucks).

187. Respondent's Brief at 5-6, Dale Properties, LLC v. State, 638 N.W.2d 763 (Minn. 2002) (No. 00-837) (citing Affidavit of Alan Dale).

188. Respondent's Brief at 5-6, Dale Properties, LLC v. State, 638 N.W.2d 763 (Minn. 2002) (No. 00-837) (citing Affidavit of Alan Dale, John Lang, Joseph Fogarty).

189. *Dale Properties*, 638 N.W.2d at 765.

190. *Id.* Dale alleged that "before the (median) closing, the highest and best use of the property was threefold: a convenience store with gas pumps, a hotel with a restaurant, and office buildings and warehouse space. Dale claimed that, after the closing, the highest and best use was residential development." *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. Dale Properties, LLC v. State, 619 N.W.2d 567, 571 (Minn. Ct. App. 2000), *rev'd*, 638 N.W.2d 763 (Minn. 2002).

the case and certiorari was granted.[195] On its face, this appears surprising as the appellate court's remand was entirely reasonable, sound and in accord with Minnesota precedent. Presumably, the Minnesota Supreme Court granted review of the case because they saw an opportunity in the *Dale* case to clarify Minnesota regulatory takings jurisprudence.

C. The Minnesota Supreme Court's Decision

The Minnesota Supreme Court reversed the appellate court. It concluded that "a property owner who retains access to traffic in one direction, although losing it in the other direction due to the closure of a median crossover, retains reasonable access as a matter of law."[196] In reaching this conclusion, the Minnesota Supreme Court relied heavily on the reasoning expressed in *Hendrickson*, *Gannons* and *Blaine Building*.[197]

The important policy considerations were explicitly highlighted in the court's opinion.[198] Most of the policy justifications and case citations were transplanted directly from *Hendrickson*, *Gannons* and *Blaine Building*.[199]

First, the court noted the state's placement of highway medians as an exercise of police power.[200] Highway medians are considered a part of the state's duty to create safe roadways.[201] Generally, the court stated, the maintenance of safe roadways is considered a legitimate exercise of the police power.[202] Second, the court noted that medians result in general travel restrictions.[203] Usually, travel restrictions such as medians are not unique to any property owner, and thus, cannot constitute a "taking."[204] Third, the closure of the median crossover did not constitute a substantial impairment of the Dale property's right of access because only

195. *Dale Properties*, 638 N.W.2d at 764.
196. *Id.*
197. *Id.* at 765-66.
198. *Id.* at 766-67.
199. *Id.*
200. *Id.* at 766; *see also* Hendrickson v. State, 267 Minn. 436, 442, 127 N.W.2d 165, 170 (Minn. 1964).
201. *Dale Properties*, 638 N.W.2d at 766.
202. *Id.*
203. *Id.* Specifically, the court stated that "restrictions on travel that result from the use of highway medians affect all members of the traveling public and are not unique to abutting property owners." *Id.*
204. *Id.* at 766; *see also* Hendrickson v. State, 267 Minn. 436, 441, 127 N.W.2d 169, 170 (Minn. 1964).

circuitry of route resulted.[205] Fourth, and finally, the court expressed a reluctance to create "a legal environment in which the cost of regulating traffic is prohibitive."[206]

The court determined that "closure of the median crossover opposite Dale's access point was a noncompensable exercise of the state's police power."[207] The *Dale* decision has a more serious consequential reach though. It has essentially foreclosed the possibility in Minnesota that compensation could ever be appropriate when a median is closed and access in one direction is lost.[208]

IV. ANALYSIS

The *Dale* decision afforded the Minnesota Supreme Court an occasion to revisit and clarify the Minnesota loss of access cases.[209] Unfortunately, the court did not carefully utilize its longstanding precedent to clearly articulate the necessary analysis a trial court should use in a loss of access case.[210] Furthermore, the Minnesota Supreme Court ran afoul of the historically broad Minnesota definition of property rights and governmental actions subject to the takings limitation.[211] Finally, the court failed to fully consider the various analytical frameworks presented on the federal level and adopt a clear standard for regulatory takings in Minnesota.

The result in *Dale* is an overly broad rule. *Dale*'s holding unnecessarily curtails the limitations on the power of eminent domain and perpetuates the existing uncertainty in Minnesota regulatory takings jurisprudence.

A. The Correct Decision

The Minnesota Supreme Court relied upon *Hendrickson*, *Gannons* and *Blaine Building* to resolve *Dale*.[212] Although these cases

205. *Dale Properties*, 638 N.W.2d at 767; *see also* People v. Sayig, 101 Cal.App.2d 890, 226 P.2d 702, 711 (1951).

206. *Dale Properties*, 638 N.W.2d at 767.

207. *Id.*

208. *Id.* at 764. "[A] property owner who retains access to traffic in one direction, although losing it in the other direction due to the closure of a median crossover, retains reasonable access as a matter of law." *Id.*

209. *Id.* 763.

210. *Id.*

211. *See supra* Part II.B.

212. *Dale Properties*, 638 N.W.2d at 765-66.

arose in analytically different scenarios,[213] the Minnesota Supreme Court acknowledged a merger of these analyses and concluded it had no effect on the ultimate finding in *Dale*.[214] As Justice Paul Anderson astutely observed in his concurrence, "the irony of citing *Blaine Building*. to support the result reached in the case before us today is that the inverse condemnation cases inappropriately relied upon in *Blaine Building*. are appropriate" for Dale's inverse condemnation claim.[215] Regardless, in light of the current law on loss of access in Minnesota, the court made the correct decision.

Like in *Hendrickson* or *Gannons*, the Dale property retains reasonably convenient and suitable access to the main thoroughfare in at least one direction.[216] In Dale's specific circumstances, closure of the median crossover requires those wishing to enter the property from the east to travel only an additional five-eighths of a mile.[217] Likewise, those wishing to exit the property and travel west are required to travel only one additional mile.[218] Minor inconvenience alone should not be a determinative factor in any takings analysis.[219] Therefore, according to the standard enunciated in *Hendrickson* and reiterated in *Gannons*, no taking occurred in this instance.[220] Arriving at the correct conclusion, however, does not necessarily indicate that the court employed an appropriate analytical process to reach its decision.

B. Unpacking the Public Policy

The primary question presented by the *Dale* case was whether the closure of a median crossover was within the state's police power. *Dale* falls squarely on the division between legitimate exercises of police power and state actions subject to the takings limitation. Thus, the court relied upon public policy to drive its

213. Anoka v. Blaine Bldg. Corp., 566 N.W.2d 331, 339 (Minn. 1997) (Paul H. Anderson, J., dissenting).

214. *Dale Properties*, 638 N.W.2d at 765.

215. *Id.* at 768 (Paul H. Anderson, J., concurring specially).

216. *Id.* at 764-65.

217. *Id.*

218. *Id.*

219. At least one other jurisdiction has considered the level of inconvenience as a factor in takings determination. *See infra* note 232.

220. *Dale Properties*, 638 N.W.2d at 768 (Paul H. Anderson, J., concurring specially).

ultimate result.[221] At first glance, the court's policy justifications seem legitimate. However, upon closer examination, a suspicion arises that the court attempted to blanket its determination of the central issue in *Dale* with a plethora of precedent and only loosely applicable policy justifications.

The court began by recognizing the state's duty to create and maintain safe roadways.[222] Furthermore, the court noted that it may be important, as a public policy matter, to ensure that the cost of regulating traffic does not become prohibitive.[223] However, the state cannot avoid compensating landowners simply by designating the activity a legitimate exercise of its police power.[224] Instead, the focus ought to remain upon the injury to the property rather than upon the nature of the state's activity.[225]

The remaining policy factors cited by the court also lack the necessary levels of relevancy and analytical substance. For example, the court's argument that compensation is not required when a state creates general travel restrictions,[226] is wholly flawed. The problem with the stated policy justification is simply put: this travel restriction affected only the Dale property. The median closure in *Dale* was not a general travel restriction. Median closures that prevent numerous roadway users from crossing over may constitute general travel restrictions. The issue is significantly more complicated when the closure of a median crossover prevents only one specific property owner's access and does not truly affect other foreseeable roadway users.

Dale presented the exact situation envisioned by the *Hendrickson* court when it noted a taking may occur if damage to a specific property owner is "different in kind and not merely in degree from that experienced by the general public."[227] The effect of the *Dale* travel restriction is clearly not shared equally amongst

221. *Id.* at 766-67.
222. *Id.* at 766.
223. *Id.* at 767.
224. Respondent's Brief at 20 n.8, Dale Properties, LLC v. State, 638 N.W.2d 763 (Minn. 2002) (No. 00-837) (citing Hendrickson v. State, 267 Minn. 436, 441-42, 127 N.W.2d 165, 170 (1964)). *See also* Balog v. State Dept. of Roads, 131 N.W.2d 402, 407 (Neb. 1964) (stating "The fact that the improvement of a highway is an exercise of the police power does not determine whether the landowner or lessee is entitled to recover damages.").
225. Respondent's Brief at 20, Dale Properties, LLC v. State, 638 N.W.2d 763 (Minn. 2002) (No. 00-837).
226. *Dale Properties*, 638 N.W.2d at 766-67.
227. *Hendrickson*, 267 Minn. at 442, 127 N.W.2d at 170.

all the traveling public. Rather, the specific property owner is forced to shoulder a disproportionate burden of the regulation – a result both the United States and Minnesota Takings Clauses were expressly designed to avoid.[228]

Finally, the court noted "as long as property owners have access to the abutting highway in at least one direction, the use of highway medians that prohibit crossover from one traveled lane to another merely results in circuity of route, as opposed to substantial impairment of the right of access."[229] In this case, though the Dale's property continues to be zoned industrial and guided commercial, large commercial vehicles simply cannot access the property from the westbound lane of Highway 5 because entry and exit necessitate wide U-turns in a high traffic area.[230]

The existence of circuitous access does not necessarily preclude a finding of substantial impairment. The court looked to the circuitous access in *Dale* and summarily determined there was not a substantial impairment of access.[231] This was improper. A court should consider the circuitous nature of the remaining access as a factor (but not a determinative factor) in whether there is a substantial impairment of access.[232]

Legitimate policy justifications were crucial in *Dale* because the governmental regulation created an enormous burden for a specific landowner.[233] The policy cited by the Minnesota Supreme Court in *Dale* simply fails to meet this challenge.

C. Shortened Analysis was Inappropriate

The shortened analysis in *Dale* was inappropriate and, as a result, the ruling was inexcusably expansive. The *Dale* court concluded that a property owner who retains access to traffic in

228. *See supra* Part II.B.

229. *Dale Properties*, 638 N.W.2d at 767.

230. Respondent's Brief at 36, Dale Properties, LLC v. State, 638 N.W.2d 763 (Minn. 2002) (No. 00-837).

231. *Dale Properties*, 638 N.W.2d at 765.

232. The North Dakota Supreme Court has adopted this view in Boehm v. Backes, 493 N.W.2d 671, 674 (N.D. 1992). In *Boehm*, the court stated that although diversion of public traffic does not create a right to compensation, "loss of traffic, loss of business, and circuitry of travel are factors to be fairly weighed in determining the reasonableness of access remaining to and from an adjacent highway after the direct physical disturbance by closure of the street intersection." *Id.* *See also* Palm Beach County v. Tessler, 538 So.2d 846, 849-50 (Fla. 1989).

233. Respondent's Brief at 5-6, Dale Properties, LLC v. State, 638 N.W.2d 763 (Minn. 2002) (No. 00-837).

one direction when a median crossover is closed, "retains reasonable access as a matter of law."[234] In support of this ruling, the court noted that median closure was a specific example of non-compensable governmental regulation in *Hendrickson*.[235]

The rule announced in *Dale* is inappropriate for several reasons. First, although the court notes this decision assumes an extreme situation will not arise,[236] it is certainly within the realm of possibilities that a closure of a median crossover could cause a "substantial interference with the possession, enjoyment or value"[237] of a property and, thus, constitute a taking. In other words, a fact situation in which the closure of a median crossover necessitates an additional one or two mile roundabout is not inconceivable.[238] One must ask: how far would the average Minnesotan be willing to extend their personal daily commute before declaring their circuitous access something more than a mere inconvenience?[239]

This ruling also disregards the Minnesota landowner's right to "reasonably convenient and suitable" access.[240] The slow, yet nonchalant, degradation of this property right contradicts the traditional broad protection afforded landowners in Minnesota.[241] As noted above, the Minnesota Constitution and statutes evince a clear policy toward providing compensation when state action

234. *Dale Properties*, 638 N.W.2d at 764.

235. *Id.* at 766 (quoting Hendrickson v. State, 267 Minn. 436, 440-41, 127 N.W.2d 165, 169-70 (1964)).

236. *Dale Properties*, 638 N.W.2d at 767 n.1.

237. *Id.* at 765 (citing Johnson v. City of Plymouth, 263 N.W.2d 603, 605 (Minn. 1978)).

238. Numerous cases from other jurisdictions have awarded damages when the restriction or limitation of access creates an undue burden on a specific landowner. *See, e.g.*, State v. Jacobs, 440 P.2d 32, 36 (Ariz. 1968) (stating that damages for loss of access cannot be "wholly contingent on the fortuity that there be an actual physical taking of property" and ordering compensation for loss of access); State v. Linnecke, 468 P.2d 8, 10-11 (Nev. 1970) (finding an additional one and a half miles of travel to be a substantial impairment); South Carolina State Highway Dept. v Allison, 143 S.E.2d 800 (S.C. 1965) (awarding damages when the frontage road connected with the controlled-access highway seven-tenths of a mile south of the owner's property).

239. Drivers in the Minneapolis-St. Paul area already face one of the most congested metropolitan areas in the nation. *See, e.g.*, "News Release June 20, 2002: New study shows traffic congestion in the Twin Cities costing drivers more in time and money" available at: *http://www.dot.state.mn.us/newsrels/02/06/20tti.html* (last visited Sept. 1, 2002); "Urban Mobility Report" Texas Transportation Institute, (2002) (available at *http://www.dot.state.mn.us/newsrels/02/06/20tti.html).*

240. *Dale Properties*, 638 N.W.2d at 768-69 (Paul H. Anderson, J., concurring specially).

241. *See supra* Part II.B.

harms property.[242] Moreover, according to the *Hendrickson* decision, what constitutes "reasonably convenient and suitable access" is a fact question for a jury's determination.[243] Thus, circuitous access resulting from a closure of a median crossover should not be "reasonable access as a matter of law."[244] Instead, the court should allow a jury to determine whether the access is reasonably convenient and suitable.[245]

The shortened analysis is the most troubling aspect of the *Dale* decision. The existing analytical structure from *Hendrickson* and *Gannons*, which permitted the state to eliminate access in one direction so long as reasonably convenient and suitable access remained, was sound. The state already enjoyed broad discretion in traffic regulation under that structure. Moreover, a possibility remained that a particularly onerous median closure might still constitute a compensable taking.

The court could have charted a more cautious course by simply reiterating and applying the *Hendrickson* and *Gannons* structure.[246] The court would have preserved Minnesota landowner's right to reasonably convenient and suitable access in median closure cases. Instead, the court adopted a categorical rule which eliminated any possibility that a median crossover closure might be a compensable taking.[247]

D. The Penn Central Transportation *Alternative*

As noted above, *Hendrickson* and *Gannons* controlled the resolution of *Dale*. Both were decided while *Mahon* was the United States Supreme Court's only declaration concerning regulatory takings.[248] Since then, the United States Supreme Court has outlined several analytical frameworks for takings determinations.[249]

242. *Id.*

243. Hendrickson v. State, 267 Minn. 436, 445-46, 127 N.W.2d 165, 172-73 (1964).

244. *Dale Properties*, 638 N.W.2d at 765.

245. Moreover, when determining whether the remaining access is reasonably convenient and suitable, the Minnesota Supreme Court has stated that the "nature of the property" must be considered, as well as the "circumstances peculiar to each case." Johnson v. City of Plymouth, 263 N.W.2d 603, 607 (Minn. 1978).

246. The Minnesota Supreme Court could have remanded the case with instructions to examine whether the remaining access was reasonably convenient and suitable.

247. *Dale Properties*, 638 N.W.2d at 764.

248. *See supra* Part II.A.1.

249. *Id.*

Minnesota has even occasionally recognized these alternatives.[250] Little prevented the Minnesota Supreme Court from examining these alternatives and adopting a new framework for loss of access cases in *Dale*.

The standard enunciated in *Penn Central Transportation Co. v. New York* remains the most consistent and well-reasoned takings framework.[251] The *Penn Central Transportation* standard, as highlighted above, utilizes a combination of factors to determine when a taking has occurred.[252] Once again, these factors include whether 1) there was an enormous adverse financial impact upon the owner of the property; 2) the landowner had a large investment-backed expectation; and 3) the governmental regulation was suspect or a public necessity.[253] The Minnesota Supreme Court, rather than creating a categorical rule for median closures, could have utilized this standard. A brief examination of *Dale* under this analytical configuration is revealing.

First, under the *Penn Central Transportation* standard, it is clear that the median closure had a significant financial impact on the Dale property. The alleged diminution in the property's value was $800,000[254] because the median closure resulted in an inability to develop or sell the land.[255] Other jurisdictions have deemed compensation appropriate when the closure of a median causes such great inconvenience and related diminution in value.[256] On the basis of this factor alone, compensation may seem appropriate.

Applying the second and third factors of *Penn Central Transportation*, however, dictates a different result. Herein, the

250. *See supra* Part II.B.1.

251. 438 U.S. 104, 124 (1977); F. Patrick Hubbard, *Palazzolo, Lucas, and Penn Central: The Need for Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 Neb. L. Rev. 465, 512-14 (2001) (stating that *Penn Cent. Transp.* is the basic test of all takings and that the continuing "importance of Penn Central is its pragmatic rejection of per se rules in favor of a balancing process. Only such a flexible approach can address the complexity of takings decisions.").

252. *Penn Cent. Transp.*, 438 U.S. at 124. *See also supra* Part II.A.1.

253. *Penn Cent. Transp.*, 438 U.S. at 124.

254. Whether reduction in value, by itself, can constitute grounds for a compensable taking is a very slippery question. For a remarkably lengthy discussion of this topic *see* Anthony Saul Alperin, *The "Takings" Clause: When Does Regulation "Go Too Far"*, 31 SW. U. L. REV. 169 (2002).

255. Respondent's Brief at 5-6, Dale Properties, LLC v. State, 638 N.W.2d 763 (Minn. 2002) (No. 00-837).

256. *See, e.g.*, Palm Beach County v. Tessler, 538 So.2d 846, 849-50 (Fla. 1989); State Dept. of Transp. v. Kreider, 658 So.2d 548, 550 (Fla. Ct. App. 1995); City of Waco v. Texland Corp., 446 S.W.2d 1, 2 (Tex. 1969).

most salient fact is the lack of investment-backed expectations[257] in the property.[258] Moreover, as the Minnesota Supreme Court noted, traffic regulations generally represent legitimate exercises of the state's police power.[259] These factors, even in light of the significant diminution in value, weigh heavily against finding a compensable taking in *Dale*. Examining *Dale* under the *Penn Central Transportation* analytical structure would most likely provide the same immediate result. But, clearly adopting *Penn Central Transportation* would have more favorable long-term consequences than adopting the categorical rule set forth by the Minnesota Supreme Court.

The Minnesota Supreme Court would have done well to adopt the *Penn Central Transportation* standard in *Dale*. Although the resolution of *Dale* would not have been enormously impacted, adopting *Penn Central Transportation* for loss of access cases would have avoided the announcement of an overly broad rule. Furthermore, its adoption also would have maintained the possibility of compensable median closures. Finally, and most importantly, its application would have signaled a serious commitment to clarifying Minnesota regulatory takings law.

V. CONCLUSION

The Minnesota Supreme Court could have chosen at least two less drastic approaches to resolving the takings issue.[260] First, the court could have remanded the case with instructions based upon *Hendrickson* and *Gannons*. Second, the court could have explicitly adopted and applied one of the analytical frameworks developed by United States Supreme Court. Either option would have more properly served the dual goals of clarifying the confusion in this area and respecting the limitations embedded in the Takings Clause.

Regardless, the Minnesota Supreme Court made a mistake by

257. What actually constitutes an investment-backed expectation is also the subject of enormous debate. *See, e.g.*, Daniel Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 216-20 (Spring 1995); Karen Brunner, *A Missed Opportunity: Palazzolo v. Rhode Island Leaves Investment-Backed Expectations Unclear as Ever*, 25 HAMLINE L. REV. 117, 146-150 (2001).

258. The Dale property was undeveloped. *Dale Properties*, 638 N.W.2d at 764.

259. *Id.* As noted above, however, not all traffic regulation should necessarily be considered non-compensable exercises of the state's police power. *See supra* Part IV.B. and n.232.

260. *See also* Dietzen, *supra* note 97, at 27.

adopting a broad rule in *Dale* because generally, in takings jurisprudence, categorical rules should be avoided.[261] After *Dale*, landowners in Minnesota can be deprived of access, so long as they retain access in the other direction, at any time and in any place, without compensation. Although the *Dale* court attempted to simplify the law, the opinion left the disorder inherent in Minnesota takings law fully intact.

261. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S.Ct. 1465, 1489 (U.S. 2002). The United States Supreme Court states that the formulation of a general rule in certain takings contexts "is a suitable task for state legislatures." *Id.* Furthermore, the Court notes that the "temptation to adopt what amount to *per se* rules in either direction must be resisted." *Id.* (citing Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).